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<b>VERONICA REYES, Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 04-1326</b>
	)	<b>Issued: December 29, 2004</b>
<b>U.S. POSTAL SERVICE, KEARNY REMOTE</b>	)	
<b>ENCODING CENTER, Kearny, NJ, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

On April 20, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 8, 2003, denying her emotional condition claim as untimely under section 8122 of the Federal Employees' Compensation Act and a March 24, 2004 decision denying her request for a review of the written record as untimely under section 8124 of the Act. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the timeliness issues under sections 8122 and 8124 of the Act.

The issues on appeal are: (1) whether the Office properly denied appellant's emotional condition claim on the grounds that it was not timely filed under section 8122 of the Act; and (2) whether the Office properly denied appellant's request for a review of the written record. On appeal appellant asserts that the time limitations should be tolled due to mental incompetence, as her "illness disabled [her] [from] reading and understanding of the subject matter."

## **FACTUAL HISTORY**

On May 24, 2003 appellant, then a 47-year-old data conversion operator, filed a claim for psychosis and delusional depression beginning on April 10, 1996.<sup>1</sup> Appellant stated that she had poor concentration and difficulty keying. Appellant noted that she first became aware of her mental illness on April 10, 1996. She did not specify the date when she first realized that her mental illness was caused or aggravated by her employment. Appellant asserted that she did not file her claim within 30 days of April 10, 1996 due to “memory loss [and] confusion.” On the reverse of the claim form, the employing establishment noted that appellant first reported her condition to her supervisor on June 6, 2003.

In a statement received by the Office on June 16, 2003, appellant explained that, beginning in April 1996, she heard voices, had difficulty concentrating and experienced tremors in her hands. She explained that prescribed medications caused bradykinesia. Appellant stated that workplace noise and “[c]lose proximity on seating arrangement” while keying “caused poor concentration” in a position that required speed and accuracy. She also asserted that she received unfavorable periodic edit results due to her slowness at keying, causing “stress and further slowing down.”

Appellant was on medical leave from January 2, 1997 to January 6, 1998, then returned to work for an unspecified period. She was found unfit for duty on June 3, 1999, stopped work on June 4, 1999 and did not return. Appellant was placed on disability retirement effective September 18, 2001.

Appellant submitted medical evidence in support of her claim. In an April 18, 1996 report, Dr. Ambrose Mgbako, an attending Board-certified psychiatrist, stated that appellant was hospitalized on April 11, 1996 and would be off duty until released by her treating physician. In slips from February 13 to June 16, 1997, Dr. Joseph T. Hayes, an employing establishment physician, found her unfit for duty pending further documentation from her physician. In an October 20, 1997 report, Dr. Gabriel Troiano, an attending Board-certified psychiatrist, found appellant unfit for duty due to depression. He released appellant to return to work on January 5, 1998, noting that she required continued treatment. In a February 5, 1998 report, a physician whose signature is illegible diagnosed psychosis requiring medication and psychotherapy.

Dr. Hayes found appellant unfit for duty as of June 3, 1999, explaining that her condition impaired her performance of the essential functions of any postal position. In a July 31, 1999 report, Dr. Sang W. Yoo, an attending Board-certified psychiatrist, diagnosed major depression with psychosis. He noted that appellant continued to experience auditory hallucinations, abnormalities of thought, psychomotor retardation, impaired judgment and insight. Dr. Yoo also found vegetative symptoms indicative of a major regression. Dr. Yoo diagnosed major depression with psychosis and found appellant unfit for duty.

In a July 11, 2003 letter, the Office advised appellant that her claim was not filed within three years of the date of injury. The Office noted that although the employing establishment

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<sup>1</sup> Appellant also filed an occupational disease claim on May 22, 2003. This claim appears to be a duplicate of the claim filed on May 24, 2003.

was aware of appellant's mental illness in 1996, there was "no evidence that [the employing establishment] had knowledge that [appellant was] suffering from a condition *caused by any work factors*." (Emphasis in the original.) The Office also noted that on the May 24, 2003 claim form, appellant did not identify any work factors which she believed caused her depression and psychosis. She responded by July 21, 2003 letter, noting her treatment for psychiatric illness in April and May 1996. Appellant asserted that the employing establishment was aware that she was unfit for duty at "different times" during 1997. She asserted that "[p]ersonally, [she thought] it was work related, *i.e.*, the nature of [her] illness. The incessant continuous voices in [her] head affected [her] thinking causing poor concentration, memory loss and confusion while performing the task of being a [d]ata [c]onversion [o]perator." Appellant also asserted that her severe mental illness made her unable to comply with "the time frame required to send a notice of illness to [the] Office."

By decision dated December 8, 2003, the Office denied appellant's claim on the grounds that her claim was not timely filed within three years of June 4, 1999, the date she stopped work. The Office found that there was no evidence indicating that the employing establishment had knowledge of any work-related condition prior to June 6, 2003.

In a letter dated February 21, 2004 and postmarked February 24, 2004, appellant submitted additional evidence and requested a review of the written record.<sup>2</sup>

By decision dated March 24, 2004, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that it was untimely filed. The Office found that as appellant's request was postmarked on February 24, 2004, more than 30 days after the issuance of the December 8, 2003 decision, she was, therefore, not entitled to a hearing or a review of the written record as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and additionally denied appellant's request on the grounds that the issue in her claim could be addressed equally well by submitting new, relevant evidence pursuant to a valid request for reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8122(a) of the Act states that an "original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>3</sup> Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware or, by the exercise of reasonable diligence, should have been aware, of the causal relationship between the employment and the compensable disability. The Board has also held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.<sup>4</sup> The Board has held that the applicable

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<sup>2</sup> As the evidence submitted with the request for a review of the written record has not been considered by the Office in reviewing the merits of the claim, the Board cannot consider such evidence on appeal with regard to the underlying merit issue -- whether appellant timely filed her compensation claim. See 20 C.F.R. § 501.2(c).

<sup>3</sup> 5 U.S.C. § 8122(a).

<sup>4</sup> *Mitchell Murray*, 53 ECAB \_\_\_\_ (Docket No. 00-2406, issued June 14, 2002).

statute of limitations commences to run although the employee does not know the precise nature of the impairment.<sup>5</sup> Also, section 8122(d)(2) provides that the time limitations under sections 8122(a) and (b) do not “(2) run against an incompetent individual while he is incompetent and has no duly appointed legal representative....”<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

In this case, the evidence establishes that appellant was aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment and an aggravation of her depression and psychosis prior to May 24, 2003, when she filed her compensation claim. Appellant explained in a June 16, 2003 letter that workplace noise and “[c]lose proximity on seating arrangement” while keying “caused poor concentration,” impairing her speed and accuracy which were already affected by mental illness and psychotropic medications. Her slowness at keying led to unfavorable periodic edit results, causing “stress and further slowing down.” Thus, appellant identified noise, a close seating arrangement and performance evaluations as work factors she believed caused or aggravated her mental illness.<sup>7</sup> Also, she described how those work factors affected her condition during her federal postal employment. Thus, the June 16, 2003 letter demonstrates that appellant was aware, prior to stopping work on June 4, 1999, that her mental illness was aggravated by employment factors.

While appellant left blank the portion of the claim form indicating when she was first aware of a causal relationship between the claimed condition and work factors, her June 16, 2003 statement indicates that she was aware of such a relationship prior to June 4, 1999. Therefore, the Board finds that appellant should have reasonably been aware that her depression and psychosis were caused or aggravated by her employment prior to June 4, 1999, the date she was last exposed to work factors. As appellant did not file her claim until May 24, 2003, her claim is clearly outside the three-year time limitation under section 8122(a) of the Act and is, therefore, untimely.

However, appellant’s claim would still be regarded as timely under 5 U.S.C. § 8122 if her immediate supervisor had actual knowledge of the injury within 30 days. This provision removes the bar of the three-year time limitation if met.<sup>8</sup> In this case, this provision would mean that the claim would be regarded as timely if the immediate superior knew of the injury within 30 days of appellant’s last exposure to work factors on June 4, 1999. The provision further provides that knowledge of the injury must be such as to put the immediate supervisor reasonably on notice of appellant’s injury.<sup>9</sup>

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<sup>5</sup> *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

<sup>6</sup> 5 U.S.C. § 8122(d)(2).

<sup>7</sup> Appellant noted in a July 21, 2003 letter that she was disabled for work due to psychiatric illness in April and May 1996 and for periods in 1997. She asserted that the nature of her psychiatric illness was work related, but did not specify when she came to this realization.

<sup>8</sup> *Hugh Massengill*, 43 ECAB 475 (1992).

<sup>9</sup> *Larry E. Young*, 52 ECAB 264 (2001).

The Board finds that there is no evidence of record from which to conclude that appellant's supervisor had actual knowledge of the claimed conditions within 30 days after her last exposure to work factors on June 4, 1999. The May 24, 2003 claim form indicates that the employing establishment did not have notice of her assertion that her mental condition was work related until June 3, 2003. Slips from the employing establishment health unit note that appellant was unfit for duty during intermittent periods from February 1997 to June 1999. However, these slips do not indicate that appellant's psychiatric conditions were work related.<sup>10</sup> Thus, there is no evidence that her supervisor had actual knowledge of the claimed depression and psychosis within 30 days of appellant's last exposure to work factors on June 4, 1999.

Appellant alleged that her failure to file a timely claim should be excused due to mental incompetence. She asserted that her depression and psychosis impaired her memory and concentration such that she was not aware of the nature of her illness and could not file a timely claim. The Board has held that it is appellant's burden to show that she is incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a claim form or of otherwise furnishing the relatively simple information necessary for filing a claim and satisfying the limitation requirements.<sup>11</sup>

In support of her assertions of mental incompetence, appellant submitted a July 31, 1999 report from Dr. Yoo, an attending Board-certified psychiatrist, who opined that she continued to experience auditory hallucinations and abnormal thought patterns, impaired insight and judgment, as well as vegetative symptoms indicative of a major regression. While found appellant incapacitated by active psychosis and depression for some period following June 4, 1999, he did not specify the precise period of impairment or state that appellant was so incapacitated that she was unable to fill out a compensation claim form. Dr. Yoo's report is thus, insufficient to establish appellant's assertion that she was mentally incompetent to file a claim form for three years after June 4, 1999. Therefore, appellant has not submitted sufficient medical evidence to meet her burden of proof to establish mental incompetence.<sup>12</sup>

### **LEGAL PRECENT -- ISSUE 2**

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary."<sup>13</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act

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<sup>10</sup> Compare *Delmont L. Thompson*, 51 ECAB 155 (1999). When a claimant seeks treatment from the employing establishment's health unit for a claimed condition, the supervisor is deemed to have actual knowledge of the claimed injury as of the date of said treatment. However, in the present case, appellant did not seek treatment from the employing establishment health unit. The evidence of record demonstrates that her interactions with the employing establishment's physician were for the purpose of assessing her fitness for duty.

<sup>11</sup> See *Alicia Kelly*, 53 ECAB \_\_\_\_ (Docket No. 01-968, issued November 29, 2001) (mental incompetence must be established through the submission of medical evidence); *Paul S. Devlin*, 39 ECAB 715 (1988).

<sup>12</sup> See *Alicia Kelly*, *supra* note 11.

<sup>13</sup> 5 U.S.C. § 8124(b)(1).

provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>14</sup> Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, pursuant to the Office's December 8, 2003 denial of her emotional condition claim, appellant requested a review of the written record in a letter dated February 21, 2004 and postmarked February 24, 2004. Section 10.616 of the Act's implementing regulations provides that a request for a review of the written record or an oral hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought."<sup>16</sup> The envelope which contained appellant's request for a review was postmarked February 24, 2004, more than 30 days after issuance of the December 8, 2003 decision. Thus, it is clear that her request for a review of the written record was not timely filed.

As appellant did not request a hearing within 30 days of the December 8, 2003 decision, she is not entitled to a hearing or review of the written record as a matter of right. The Office must then exercise its discretion to determine whether appellant's request for a review of the written record should be granted. In its March 24, 2004 decision, the Office considered the issue involved and found that appellant could pursue it equally well through submitting new, relevant evidence on reconsideration. Therefore, the Office properly exercised its discretion in denying appellant's request for a review of the written record.

### **CONCLUSION**

The Board finds that the Office properly found that appellant did not timely file her compensation claim within the three-year time limitation of section 8122. The Board further finds that the Office properly denied appellant's request for a review of the written record on the grounds that it was untimely filed.

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<sup>14</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>15</sup> *Delmont L. Thompson*, *supra* note 10; *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

<sup>16</sup> 20 C.F.R. § 10.616(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 24, 2004 and December 8, 2003 are affirmed.

Issued: December 29, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member